Supreme Court, U.S.
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No. 87-987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ZAC SMITH & COMPANY, INC.,
Petitioner,

OTIS ELEVATOR COMPANY,
Respondent.

ON PETITION FOR CERTIORARI

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether or not Petitioner purposefully established minimum contacts with Texas for personal jurisdiction to attach consistent with due process.

Whether or not Petitioner presented a compelling case that the presence of some other considerations would render jurisdiction unreasonable when the record evidence showed that Petitioner had purposefully established minimum contacts with Texas.

LIST OF ALL PARTIES

Petitioner, ZAC SMITH & COMPANY, INC., has no parent company, subsidiaries, or affiliates.

Respondent, OTIS ELEVATOR COMPANY, is a wholly owned subsidiary company of UNITED TECHNOLOGIES CORPORATION. UNITED TECHNOLOGIES CORPORATION has no other domestic subsidiary companies or affiliates which are not wholly owned.

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II. This is not a case of first impression as suggested by Petitioner because this Court, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), clearly addressed each issue raised in the Petition for Certiorari.

III. The Texas supreme court correctly held that Petitioner failed to present a compelling case that the presence of some other considerations rendered jurisdiction unreasonable in accordance with this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OTIS ELEVATOR COMPANY (OTIS ELEVATOR), Respondent in the above-styled and numbered cause, files this Brief in Opposition to the Petition for Writ of Certiorari filed herein by ZAC SMITH & COMPANY, INC. (ZAC SMITH), and would respectfully show the Court as follows:

STATEMENT OF THE CASE

OTIS ELEVATOR would direct this Court's attention to the opinion of the Texas supreme court in this case which correctly recites the undisputed facts.[1] Based upon these undisputed facts, the court affirmed the decision of the court of appeals, and held as a matter of law that ZAC SMITH purposefully established minimum contacts with Texas for personal jurisdiction to attach consistent with federal due

[1]The following facts are recited by the Texas supreme court in its opinion rendered July 8, 1987 in *Zac Smith & Company, Inc. v. Otis Elevator Company*, 734 S.W.2d 662 (Tex. 1987), at pp. 664-665:

> ". . . In August 1983, Smith, a Florida bonding agent, and Advanced Concrete, [a Texas corporation and] a general contractor and manufacturer of prefabricated building materials, were joined as a joint venture for the sole purpose of constructing a hotel in the Panhandle of Florida. In mid-August of 1983, Smith and Advanced Concrete, as a joint venture, were notified by Waldorff Insurance & Bonding Company of Fort Walton Beach, Florida, of Lumberman's Mutual Casualty Company's intent to bond an 18-story hotel in Texas as long as certain conditions were met, including that the bond be issued to the joint venture. In September 1983, Double W Investors, the owner of a tract of land in Austin, entered into a contract with Advanced Concrete for construction of an 18-story Ramada Inn on its property. On October 25, 1983, Hebert Watkins, president of Advanced Concrete, executed a contract with Otis Elevator for the manufacture, sale, delivery and installation of four elevators for the Austin hotel. Six days later, Advanced Concrete and Smith executed a joint venture agreement for the purpose of constructing the Austin hotel. The agreement provided, among other matters, that both parties were responsible for the project's superintendent and control; that Smith was to provide an on-site manager with full authority to act on behalf of Smith; and that Smith would furnish the joint venture bond and the project's working capital.
>
> "In February 1984, Double W Investors executed a new contract for construction of the hotel on its property, this time with Advanced Concrete and Smith, a joint venture, and Austin Hotel Association, Ltd. On March 28, 1984, the City of Austin issued a building permit; however, the parties dispute to whom the permit was issued. The permit recites in typewritten form that it was issued to Austin Hotel Association, Ltd., and Advanced Concrete of Texas. Following 'Advanced Concrete of Texas' is the handwritten notation 'and Zac Smith Co., a Joint Venture.' The director of the city's building inspection

process requirements[2] and the Texas long-arm statute.[3] *Zac Smith & Company, Inc. v. Otis Elevator Company*, 734 S.W.2d 662, 666 (Tex. 1987). The court further held that ZAC SMITH failed to meet its burden of proof to make a compelling case that the presence of some other considerations would render jurisdiction unreasonable. *Id.* at 664.

REASONS FOR DENYING THE WRIT

The decision of the Texas supreme court in this case is not in conflict with applicable decisions of this Court because the undisputed record evidence established that ZAC SMITH'S activities were "purposefully directed" to Texas and that the litigation in Texas resulted from alleged injuries that "arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). These undisputed facts also show that ZAC SMITH'S activities in Texas were both deliberate and significant as contemplated by *Burger King Corp.*, 471 U.S. at 475-476.

Additionally, ZAC SMITH failed, as a matter of law, to present a compelling case that the presence of some other considerations would render jurisdiction unreasonable, in accordance with *Burger King Corp.*, 471 U.S. at 477, and *Siskind v. Villa Foundation For Education, Inc.*, 642 S.W.2d 443, 438 (Tex. 1982).

For these reasons, this Court should decline to exercise its jurisdiction in this case.

> department certified that the permit was issued to 'Advanced Concrete of Texas and Zac Smith, JTV.' Lumberman's Mutual, as surety, issued a bonding and escrow agreement to the joint venture on April 12, 1984, in the amount of $9,856,000 for construction of the hotel; however, the performance bond was not executed. The construction of the hotel was never realized. Meanwhile, with a delivery date of July 2, 1984, Otis Elevator proceeded with the manufacture of the four elevators under contract, and delivered the elevators to the Texas construction site, which was vacant except for a trailer. . . ."

[2] U.S. Const. amend. XIV, § 1.

[3] Tex. Civ. Prac & Rem. Code §§ 17.041-17.045 (1987).

PRELIMINARY STATEMENT

The decision of the Texas supreme court in this case is consistent with *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.95, 161 ALR 1057 (1945), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), as well as other applicable decisions by this Court as hereinafter discussed. The undisputed facts of this case established that ZAC SMITH'S constitutional rights were not usurped by the Texas court.

The facts which establish Texas jurisdiction over ZAC SMITH in this case are undisputed. The acts and transactions by ZAC SMITH (1) in securing the necessary bond commitment for the hotel project, (2) in negotiating and contracting with the Texas property owner, Double W Investors, and (3) in negotiating and contracting with the Texas corporation, Advanced Concrete of Texas, Inc., were deliberate, purposeful and calculated to produce one result: commercial profit from the construction of a hotel in Austin, Texas. This was ZAC SMITH'S stated purpose in the contract documents. As noted by the Texas supreme court, these contracts were wholly performable in Texas and ZAC SMITH anticipated its entire performance under these contracts to occur in Texas. Accordingly, the court held that jurisdiction over ZAC SMITH was established as a matter of law and that there was a lack of other circumstances which would render jurisdiction unreasonable. *Zac Smith & Company v. Otis Elevator Company*, 734 S.W.2d 662, 665 (Tex. 1987).

ARGUMENT AND AUTHORITIES

I. The Texas supreme court correctly held that Petitioner had sufficient contacts with Texas for personal jurisdiction to attach, in accordance with this Court's prior decisions, because Petitioner's activities were purposefully directed to Texas and the litigation resulted from alleged injuries that arose out of or related to those activities.

Texas courts apply a strict test when determining the constitutional reach of Texas' jurisdiction over non-residents

with only a single or few contacts with Texas. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978); *O'Brien v. Lanpar Co.*, 399 S.W.2d 340 (Tex. 1966). In order for a Texas court to exercise jurisdiction, it must be found that:

> (1) The non-resident defendant or foreign corporation did some purposeful act or consummated some transaction in Texas;
>
> (2) The cause of action arose from, or was connected with, such act or transaction; and
>
> (3) The assumption of jurisdiction by Texas would not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in Texas, the relative convenience of the parties, the benefits and protection of the laws of Texas afforded the respective parties, and the basic equities of the situation.

Id. at 342.

This three-pronged test ensures that a non-resident's due process rights are guaranteed. It was this test that the Texas supreme court applied in holding that the facts of this case established, as a matter of law, that ZAC SMITH had sufficient contacts with Texas for personal jurisdiction to attach.

ZAC SMITH'S argument concerning the validity of the joint venture agreement between itself and Advanced Concrete, the Texas corporation, are immaterial and irrelevant to this jurisdictional issue. The important feature in this case concerns ZAC SMITH'S prior negotiations and future contemplated consequences of its conduct as related to its activities in Texas. As this Court stated in *Burger King:*

> ". . . [A] 'contract' is 'ordinarily but an intermediate step serving to tie up prior business negotiations with future conse-

> quences which themselves are the real object of the business transaction.' . . . It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum."

Burger King Corp., 471 U.S. at 479, citing and quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316-317, 63 S.Ct. 602, 87 L.Ed. 77, 145 ALR 1113 (1943).

ZAC SMITH candidly admits in this Court that it contemplated making a profit in Texas based upon its contract with Advanced Concrete, the Texas corporation,[4] and the Texas property owner, Double W Investors. ZAC SMITH deliberately entered into the written joint venture agreement with Advanced Concrete for the purpose of building a hotel in Austin, Texas, and the elevator contract is related directly to the hotel enterprise. The City of Austin, Texas issued a building permit for the project; the elevator contract was executed and the products under that contract were manufactured and delivered to Austin, Texas. The purpose of this joint venture between ZAC SMITH and Advanced Concrete was wholly performable in Texas, and ZAC SMITH'S contract with Double W Investors, the property owner, was wholly performable in Texas. All parties anticipated to profit from the construction of the hotel in Texas and the benefits and protections of the laws of Texas, as well as the City of Austin,

[4]The written joint venture agreement signed by ZAC SMITH and Advanced Concrete provides in part that the purpose of the agreement is ". . . bringing the best advantages of both companies together for the pursuit of a single project namely construction of the Austin Ramada Hotel, located in the city limits of Austin, Texas . . . ." The agreement also provides that profits from the endeavor are to be ". . . shared on a 50/50 basis between the two parties . . ." and that "ZAC SMITH is to provide an on-site office manager with full authority to act . . ." on its behalf.

were called into play. These contacts by ZAC SMITH with Texas were not "random," "fortuitous," or "attenuated," *Burger King Corp.* 471 U.S. at 480-481; nor can it be said that ZAC SMITH could not anticipate being haled into court in Texas for alleged damages arising out of the hotel project, under these circumstances. *Zac Smith & Company, Inc. v. Otis Elevator Company*, 734 S.W.2d 662, 665-666 (Tex. 1987).

It is incomprehensible for ZAC SMITH to suggest that it did not have fair warning that it was subject to suit in Texas based upon these undisputed facts. ZAC SMITH admittedly endeavored to profit in Texas and committed deliberate and purposeful acts there. This is not a case of "attenuated" contacts as argued by ZAC SMITH. This is a case of deliberate, purposeful and significant contacts by ZAC SMITH itself, each of which was calculated for commercial profit in Texas. See generally *Burger King Corp.*, 471 U.S. at 475-476.

ZAC SMITH'S argument concerning the validity of its written joint venture agreement with Advanced Concrete is appropriate in a trial on the merits relating to its liability for the alleged breach of the elevator contract, and not on the question of jurisdiction. *Zac Smith & Company, Inc. v. Otis Elevator Company*, 734 S.W.2d 662, 664 (Tex. 1987). Furthermore, ZAC SMITH'S argument that the Texas supreme court improperly considered the building permit issued for the hotel project is without merit because this piece of evidence was expressly excluded from consideration by the court and played no part in its decision in this case. Instead, the Texas court based its holding on the remaining undisputed facts which clearly satisfied the three-pronged test applied in Texas for long-arm jurisdiction which ensures federal due process guarantees to the non-resident. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760 (Tex. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 ALR 1057 (1945).

II. This is not a case of first impression as suggested by Petitioner because this Court, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), clearly addressed each issue raised in the Petition for Certiorari.

ZAC SMITH suggests that this is a case of first impression and advances several arguments in support of this proposition, each of which has been clearly rejected by this Court in *Burger King vs. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), and accordingly rejected by the Texas supreme court in this case. Firstly, ZAC SMITH argues that its only contact with Texas was an "unconsummated" joint venture agreement with the Texas corporation (Advanced Concrete), and that this in itself did not constitute substantial or purposeful conduct which would allow Texas to assert personal jurisdiction over it. This argument is clearly without merit and is not supported by the substantial undisputed evidence in this case which clearly illustrated that ZAC SMITH deliberately engaged in significant activities within the state of Texas and created continuing obligations between itself, the Texas corporation (Advanced Concrete), and Texas property owner (Double W Investors). This Court in *Burger King* stated that:

> ". . . [W]ith respect to interstate contractual obligations, we have emphasized that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other state for the consequences of their activities. *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 94 L.Ed. 1154 (1950). See also *McGee v. International Life Insurance Company*, 355 U.S. 220, 222-223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)."

Burger King Corp., 471 U.S. at 473.

This argument also ignores the record evidence establishing ZAC SMITH'S prior negotiations in dealing with the various parties involved in the Texas hotel project, as well as the future consequences of those negotiations as stated in the

contract documents. Surely, it cannot be argued under these facts that ZAC SMITH did not have fair warning that its activities may subject it to the jurisdiction of Texas. ZAC SMITH most certainly could anticipate that disputes might arise between itself and the Texas property owner, or between itself and Advanced Concrete, as well as other subcontractors, suppliers and materialmen. This Court recognized the significance of these two factors—prior negotiations and contemplated future consequences—in determining whether the defendant purposefully established minimum contacts with the forum. *Burger King Corp.*, 471 U.S. at 479.

It is difficult to find merit in ZAC SMITH'S second argument that OTIS ELEVATOR'S cause of action does not arise out of its activities in Texas in light of the undisputed facts of this case. The contracts which ZAC SMITH signed with Advanced Concrete and with Double W Investors clearly had a substantial connection with Texas and the elevator contract was related to these contracts. *See Burger King Corp.*, 471 U.S. at 479. ZAC SMITH deliberately reached out beyond its home state of Florida and negotiated with a Texas corporation and a Texas property owner in order to profit from this enterprise. The written joint venture agreement with Advanced Concrete was carefully drafted by ZAC SMITH and envisioned continuing and wide-reaching contacts in Texas. See *Burger King Corp.*, 471 U.S. at 479-480. Additionally, both contracts signed by ZAC SMITH were wholly performable in Texas and all parties anticipated to profit in Texas. ZAC SMITH purposefully affiliated itself with a Texas corporation (Advanced Concrete) and Texas property owner (Double W Investors) so that it could profit in Texas.

Under these circumstances, it would be unfair to allow ZAC SMITH to escape having to account in Texas for the consequences that arise proximately from its activities there. As this Court stated in *Burger King Corp.*:

> ". . . [T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because 'modern transportation and communications have made it much less burdensome

> for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. *McGee v. International Life Insurance Co.* . . . [355 U.S.], at 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

Burger King Corp., 471 U.S. at 474.

The undisputed facts of this case conclusively established that ZAC SMITH deliberately engaged in significant activities within Texas and created continuing obligations between itself and the Texas corporation (Advanced Concrete), and the Texas property owner (Double W Investors) by signing separate written contracts with each entity. In doing so, ZAC SMITH manifestly availed itself of the privilege of conducting business in Texas. Therefore, it would not be unreasonable to require ZAC SMITH to submit to the burden of litigation in Texas in this case. See *Burger King Corp.*, 471 U.S. at 476.

III. The Texas supreme court correctly held that Petitioner failed to present a compelling case that the presence of some other considerations rendered jurisdiction unreasonable in accordance with this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d (1985).

ZAC SMITH argues that the assertion of jurisdiction over it is unfair because it could not have reasonably anticipated being haled into a Texas court under the circumstances of this case. This is an untenable position in light of its written contract with the Texas property owner and Advanced Concrete, both of which were wholly performable in Texas. At the time of negotiating these contracts, ZAC SMITH certainly knew that suppliers, subcontractors, and materialmen would necessarily supply goods and services in order to successfully complete the project. Disputes arising from such contracts were both inevitable and foreseeable to ZAC SMITH. For these reasons, it was presumptively reasonable for ZAC SMITH to be called to account in Texas for injuries arising out of a project from which ZAC SMITH sought to profit. *Burger King Corp.*, 471 U.S. at 480.

Since the evidence demonstrated as a matter of law that ZAC SMITH purposefully availed itself of the benefits and protections of the laws of Texas, it was incumbent upon ZAC SMITH to present a compelling case that the presence of some other considerations rendered jurisdiction unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 477. However, ZAC SMITH wholly failed to show why Texas jurisdiction over it would be unreasonable in this case, especially in light of the fact that ZAC SMITH engaged in other joint ventures with Advanced Concrete, for projects in states other than Texas, thus demonstrating the interstate character of ZAC SMITH'S business. See *Burger King Corp.*, 471 U.S. at 473.

The interest of the state of Texas in providing a forum for this dispute was adequately considered by the Texas supreme court. The court stated the rationale for its holding on this point as follows:

> ". . . The purpose of the joint venture was wholly performable in Texas and the contract with Double W, the property owner, was wholly performable in Texas. The parties anticipated a profit from the construction of the hotel in Texas, and the benefits and protections of the laws of this State, as well as the City of Austin, were called into play . . . Since mid-August of 1983, Smith purposefully directed its activities toward Texas residents; numerous contract negotiations for the construction of the hotel and all future consequences of the parties' course of action were directed toward Texas. The elevator contract was just one intermediate step toward finalizing the project, which was the real object of the business transaction. . . ."

Zac Smith & Company Inc. v. Otis Elevator Company, 734 S.W.2d 662, 666 (1987).

ZAC SMITH'S argument concerning the undue burden it would face in having to litigate this dispute in Texas is also without merit. ZAC SMITH is admittedly an interstate business. In *Burger King Corp.*, the same argument was advanced by the appellee Rudzewicz and dismissed by this

Court. Rudzewicz claimed that Florida's interest in providing a convenient forum was negligible given the [resident company's] size and ability to conduct litigation anywhere in the country. This Court held:

> ". . . Absent compelling considerations, cf. *McGee v. International Life Insurance Co.*, 355 U.S., at 223, 78 S.Ct. 199, 2 L.Ed.2d 223, a defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth."

Burger King Corp., 471 U.S. at 483, note 25.

Because ZAC SMITH established a substantial and continuing relationship within the state of Texas, received fair notice that it might be subject to suit in Texas as a result of signing contracts wholly performable in Texas, and since ZAC SMITH failed to demonstrate how jurisdiction in Texas would otherwise be fundamentally unfair, it is reasonable for Texas to assert jurisdiction over ZAC SMITH in this case and to do so would not offend due process.

CONCLUSION

For the reasons stated above, OTIS ELEVATOR urges that the Petition for Writ of Certiorari be denied.

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